(7) (4) (4)

No. 03-1230, 03-1234, and 03-1250

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In the Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC., and USF HOLLAND, INC., *Petitioners,*
v.
MICHIGAN PUBLIC SERVICE COMMISSION, ET AL.

MID-CON FREIGHT SYSTEMS, INC ET AL, *Petitioners*
v.
MICHIGAN PUBLIC SERVICE COMMISSION, ET AL.

TROY CAB, INC, ET AL, *Petitioners*
v.
MICHIGAN PUBLIC SERVICE COMMISSION, ET AL.

On Petitions For Writs of Certiorari To The Michigan Court of Appeals

RESPONDENTS' SUPPLEMENTAL BRIEF IN RESPONSE TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

Michael A. Cox
Attorney General

Thomas L. Casey
Solicitor General
Counsel of Record
P. O. Box 30212
Lansing, Michigan 48909
(517) 373-1124

Henry J. Boynton
Assistant Solicitor General

David A. Voges
Emmanuel B. Odunlami
Assistant Attorneys General
Attorneys for Respondents

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On June 7, 2004, this Court invited the U.S. Solicitor General to file a brief expressing the views of the United States. On December 17, 2004, the United States filed its brief as amicus curiae. This supplemental brief responds to the Brief of the United States.

INTRODUCTION

The most significant aspect in these cases is the almost total absence of facts to support the Petitioners' claims. Despite having numerous opportunities to present facts to the trial court the Petitioners failed to do so. Thus, following the filing of motions for summary dispositions, the Petitioners' lawsuits were dismissed in accordance with the Michigan Court Rules. The Michigan Court of Appeals below made repeated references to the Petitioners' failure to develop a factual record.

Despite Petitioners' failure to develop a factual record, the United States, as amicus curiae, argues that certiorari should be granted in two cases (Case Nos. 03-1230 and 03-1234) and at one point even suggests that this Court decide the law and consider remanding the matter back to the Michigan courts for the development of a factual record. This clearly is placing the cart before the horse. Moreover, it effectively nullifies the requirement under the Michigan Court Rules, that a litigant, when challenged, has the obligation to set forth facts that supports its claims. Because of the lack of an adequate factual record and because of a lack of a meaningful conflict between the Michigan Court of Appeals' decision and a decision of another state court or a United States Court of Appeals, certiorari should be denied in all three cases.

A. Case No. 03-1230

The brief for the United States, despite its recommendation to the contrary, confirms that the petition in 03-1230 does not warrant this Court's review. In footnote 11, appearing on page 17 of its brief, the United States candidly admits that the record fails to show "the extent" to which the Michigan fee "actually deters

out-of-state carriers from competing with intrastate hauls" or "the extent" to which the fee "otherwise affects out-of-state carriers disproportionately or burdens interstate commerce." The footnote then concludes, saying:

> Accordingly, if the Court grants review in No. 03-1230 and articulates a general framework for analyzing fees as the one imposed by Section 478.2(1) under the Commerce Clause, the Court may find it appropriate then to remand this case to the Michigan Courts for application of that framework, including the development of any further factual record that may be necessary.

In short, the United States is asking this Court to issue an advisory opinion on the controlling law in the absence of facts supporting the Petitioners' claims.

There are problems with this approach, however. First, while the Court may attempt to anticipate and decide all aspects presented with this claim, subsequent remand proceedings may very well demonstrate that a critical question was not addressed, perhaps necessitating further review by this Court. In short, because the facts have not been fully developed, No. 03-1230 is not suitable for review. Second, such an approach effectively nullifies Michigan Court Rule (MCR) 2.116(C)(10), that provides that summary disposition is properly granted against a party when that party fails to present evidence to support its claims. As the Respondents noted in their Brief in Opposition the Michigan Court of Appeals determined that the Petitioners' claim was a "matter of pure speculation" and affirmed the trial court's grant of summary disposition against Petitioners. Were this Court to grant certiorari in the manner suggested by the United States, Petitioners would effectively be permitted to evade MCR 2.116(C)(10), without the wisdom or basis of that court rule ever being addressed.

Finally, the claim by the United States that the Michigan Court of Appeals' decision brings it into conflict with the highest courts of three States is misplaced. As the Respondents noted and explained in their Brief in Opposition the charges that were assessed in those cases bear little similarity to and were of an entirely different character than the fee challenged here. Moreover, it is clear that in each of those cases the challenges involved a more fully developed factual record than presented here. Indeed in *American Trucking Ass'n v New Jersey*, 852 A2d 142, 146 (2004), the New Jersey Supreme Court specifically noted that in 2000 it had issued an order [752 A2d 1286 (2000)] remanding the case back to the trial court due to the "need for a well-developed factual record before deciding the ultimate constitutional issues." The need for a well-developed factual record to support Petitioners' claims in this case is no less than in the case before the New Jersey Supreme Court. Here, however, the Petitioners waived that opportunity by failing to present facts to the trial court when it was required to do so under the Michigan Court Rules. Eleventh-hour attempts to resuscitate Petitioners' claim without the evidence to support it do not warrant the granting of certiorari.

B. Case No. 03-1234

The Petitioners in No. 03-1234 likewise failed to present evidence to support their claims when required to do so by the Michigan Court Rules. Instead their challenge is based on erroneous, speculative, and exaggerated claims as fully detailed in the Respondents' Brief in Opposition. The United States' brief fares no better in that it overlooks the fact that the fee charged by Michigan Compiled Laws (MCL) 478.2(2) is a regulatory fee that applies only to those interstate motor vehicles that are base-plated in Michigan. The failure to recognize this critical distinction reflects a fundamental misunderstanding of the Michigan law.

When discussing whether the Single State Registration System (SSRS) preempts the $100 fee imposed by Michigan under MCL 478.2(2), the United States says, "The question here

is not whether a State may impose *any* taxes or fees on motor carriers; instead, the question is whether it may impose fees covered by the SSRS in excess of the amounts permitted by the SSRS." Brief for the United States, p 9. (Emphasis in original). Yet, when quoting from the SSRS, 49 USC § 14504(c)(2)(C), the United States omits important controlling language. This statute states, "The charging or collection of any fee under this section that is not in accordance with the fee system *established under subparagraph (B)(iv) of this paragraph* shall be deemed to be a burden on interstate commerce." (Language omitted by the United States is in italics).

Subparagraph (B)(iv) of 49 USC § 14504 states:

> (iv) [The standards of the Secretary] shall establish a fee system for the filing of proof of insurance as provided under subparagraph (A)(ii) of this paragraph that –
>
> > (I) is based on the number of commercial motor vehicles the carrier operates in a State and on the number of States in which the carrier operates;
> >
> > (II) minimizes the costs of complying with the registration system; and
> >
> > (III) results in a fee for each participating State that is equal to the fee, not to exceed $10 per vehicle, that such State collected or charged as of November 15, 1991; and . . . .

It is clear from this unambiguous language that the reliance by the United States on 49 USC § 14504 is misplaced. The reference to "the charging or collection of any fee under this section that is not in accordance with the fee system * * * shall be deemed to be a burden on interstate commerce" relates to fees for filing interstate motor carrier's proof of insurance, not a regulatory fee that includes safety reviews, investigations and roadside enforcement by Michigan State Police. See Affidavit of Thomas R. Lonergan, ¶¶ 16, 23-25, (Respondents' Brief in Opposition, Case No. 03-1234, Res. App. pp 10b, 14b-16b);

Affidavit of Captain Timothy J. Yungfer, ¶¶ 2-12 (Respondents' Brief in Opposition, Case No. 03-1234, Resp. App. pp 30b-32b).

SSRS compliance can be found under MCL 478.7, mandating a $10.00 maximum fee for the filing of an interstate motor carrier proof of insurance and Interstate Commerce Commission (ICC) permit. To help defray the costs of safety regulation and enforcement on Michigan highways, MCL 478.2(2) imposes a $100 fee on vehicles that are issued Michigan license plates. Michigan does not collect the $100 fee from interstate motor carriers that are not base-plated in Michigan.

In support of its argument, the United States cites *State Ex Rel Sammons Trucking, Inc v Boedecker*, 158 Mont 397; 492 P2d 919 (1972). In that case, the Montana Public Commission registered all interstate carriers under the state statute. The Court held that the federal bingo card system, including regulations promulgated by the ICC, was controlling over contrary state law provisions. In this case, there is no conflict between federal and state law. Unlike MCL 478.2(2), the Montana fee specifically related to the issuance of the state certificate to all motor carriers. The regulatory fee under MCL 478.2(2) is not a fee charged to allow vehicles to cross into the state territory but rather the fees are only imposed on Michigan-plated carriers to cover the cost of safety regulations.

C. Case No. 03-1250

The Respondents agree with the United States that the Petition in No. 03-1250 does not warrant certiorari.

CONCLUSION

The failure of the Petitioners in 03-1230 and 03-1234 to present facts to support their claims when required to do so under the Michigan Court Rules justified the dismissal of those claims by the trial court. As such, they are not suitable for review by this Court.

Respectfully submitted

Michael A. Cox
Attorney General

Thomas L. Casey
Solicitor General
Counsel of Record
P. O. Box 30212
Lansing, Michigan 48909
Telephone: (517) 373-1124

Henry J. Boynton
Assistant Solicitor General

David A. Voges
Emmanuel B. Odunlami
Assistant Attorneys General
Attorneys for Petitioners

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